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No. 92-1878

In The

Supreme Court of the United States

October Term, 1992

LIMA MEMORIAL HOSPITAL AND GREGORY TURNER,

Petitioners,

v.

WILLIAM L. MANION, M.D.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's holding, that the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101 *et seq.*, grants to hospitals and physician peer reviewers immunity from damages and not from suit, comports with this Court's characterization of such immunity in *Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991) and with congressional intent.

2. Whether a district court's denial of a motion for summary judgment based on HCQIA immunity is immediately appealable under the collateral order doctrine.

3. Whether the Sixth Circuit's decision that the denial of a motion for summary judgment based on HCQIA immunity is not immediately appealable conflicts with the Tenth Circuit's decision in *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

PARTIES TO THE PROCEEDING

Respondent wishes to bring to the attention of this Court that petitioners have first failed to identify all parties to the proceeding. Pinnacle Billing Company, Inc., a private billing company formerly owned by defendant, Gregory Turner, is also a defendant in this action. Petitioners have also mistakenly identified defendant Shobha Pai, M.D. as being a co-defendant with Dr. George Evans in Dr. Manion's first action initiated in July of 1989. In fact, Shobha Pai was a co-defendant with Gregory Turner, Lima Memorial Hospital and Pinnacle Billing Company only in a second action brought in July of 1990. Later, both actions were consolidated following cross claims by Pinnacle Billing Company and Dr. George Evans against Gregory Turner and cross claims by Dr. George Evans against Lima Memorial Hospital, Dr. Shobha Pai and Pinnacle Billing Company. Dr. Manion has not filed suit against any physician committee member because he believed that the committee members were presented with perjured testimony.

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To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

Respondent, William L. Manion, M.D., by and through his attorney of record, hereby submits his brief in opposition to the petition for the writ of certiorari.

STATEMENT OF THE CASE

This case arose because Petitioners, Lima Memorial Hospital and hospital President, Gregory W. Turner, summarily suspended Dr. Manion from practicing pathology and acting as Chairman of the Department of Pathology at Lima Memorial Hospital. Mr. Turner is not a physician

and relied upon no medical recommendation for suspension. The unjustified suspension was initiated in an effort to force Dr. Manion to resign his position at Lima. The issues before this Court for review arose as a result of a denial of a Motion for Summary Judgment by the United States District Court for the Northern District of Ohio, Western Division. Contrary to the very short statement of facts contained in the Petitioners' Brief, that court had before it extensive affidavits, depositions, and various other forms of documentary evidence demonstrating anticompetitive and bad faith motives of petitioners. Substantial disputes of fact existed and still exist in this matter. Those disputes concern the initial and subsequent conduct surrounding Dr. Manion's suspension, its review by various hospital committees, and his subsequent sham reinstatement to practice pathology and serve as Chairman of that Department.

The Petitioners would have this Court understand that Dr. Manion's suspension was handled as a matter of routine procedure with full notice, opportunity to confront witnesses, and due process protection. That is not the case. Dr. Manion presented evidence to the District Court, that if believed by a jury, would show that he had initiated plans to set up an outpatient pathology lab which Mr. Turner opposed because it would compete with the Hospital's own laboratory service. Mr. Turner also opposed this measure because he collected substantial revenues of over $300,000 per year from the radiology and pathology departments at Lima through his private billing company, Pinnacle Billing Service, Inc. Mr. Turner believed that Dr. Manion would establish his own billing service to collect revenues for his private laboratory and

professional services, thus eliminating Mr. Turner's lucrative billing arrangement.

After he became aware of Dr. Manion's plans, Mr. Turner suspended Dr. Manion on August 3, 1988, initially claiming that Dr. Manion's colleagues, Drs. Pai and Evans, would not recommend him for advancement to active staff. In fact, Drs. Pai and Evans conspired with Mr. Turner and agreed to support Turner to coerce Dr. Manion's resignation in exchange for lucrative hospital contracts and Dr. Manion's chairmanship. It is undisputed that Mr. Turner offered Dr. Evans an employment contract shortly after Dr. Evans testified against Dr. Manion before the peer review committee. Dr. Evans claims that a private Pinnacle Billing contract was also presented to him with his hospital employment contract.

Mr. Turner initiated the suspension on August 3, 1988 but made no attempt to report it to the State Medical Board. At no time throughout all of the proceedings followed at Lima Memorial Hospital, did any hospital representative make any attempt to notify the Ohio State Medical Board that Dr. Manion's privileges had been suspended. In fact, Dr. Manion brought to the District Court evidence that Mr. Turner repeatedly attempted to bargain his suspension into a resignation from the Hospital in exchange for a recommendation letter. When Dr. Manion refused to resign, Mr. Turner and co-defendants orchestrated a series of so-called peer review proceedings designed to get rid of him. Congress in the HCQIA specifically sought to eliminate such a secret resignation by a physician given in exchange for promises by the hospital not to disclose that the physician was under investigation for possible incompetence. *See* 42 U.S.C. §§ 11111(b) and

11133(a)(1)(B). Ironically, these petitioners now seek immunity under the very Act which they tried to subvert by offers of nondisclosure and non-reporting.

Right after Mr. Turner's initial notice of suspension, Dr. Pai, Dr. Manion's business partner, dissolved her business relationship with him. She was not required to take this action by either their partnership agreement or their proposed corporate documents. This would allow Pai and Evans to form a new business entity for the provision of laboratory services. Consequently, Dr. Manion presented substantial evidence to the District Court of an economic or business motive for the allegations made against him.

The evidence presented to the District Court also showed that one of the early peer review proceedings was a meeting of the Medical Staff Executive Committee of Lima Memorial Hospital, about which Dr. Manion received no notice of charges and was denied the right to confront or cross examine any witnesses. No transcript was made of the secret proceedings and alleged testimony. The Executive Committee then affirmed the summary suspension and Dr. Manion, still refusing to resign, requested a hearing. This time he asked that he be informed of the charges and be given a chance to confront his accusers.

Only after Dr. Manion made this request did Mr. Turner, Dr. Pai, Dr. Evans and their agents search through pathology files and meet with personnel in order to create charges which could somehow justify the suspension before the Hospital's Ad Hoc Review Committee. Again, no attempt was made to inform the Ohio State Medical

Board that Dr. Manion's summary suspension had been sustained by the Medical Staff Executive Committee.

Contrary to the Petitioners' allegations, Dr. Manion did challenge the procedures and attacked the information furnished to the Ad Hoc Review Committee. Specifically, he provided the affidavits of both of the Hospital's *own* outside consultants, Dr. Michael Clark and Dr. Frank Reale, who were brought in to testify *against* Dr. Manion. In his affidavit, Dr Clark stated:

> I have very serious questions about just what was submitted for my review since there seemed to be two versions of these reports. . . . If I was given reports Dr. Manion never signed out, or never diagnosed, then he is a victim of fraud and bad faith peer review. As I was not given reports that Dr. Manion had signed, I suspect he is a victim of fraud and bad faith peer review.

(Clark affidavit at p. 2-3).

The District Court also received testimony and other admissible evidence that Lima Memorial Hospital and Mr. Turner never intended to abide by the recommendations of its own Ad Hoc Review Committee. In fact, a replacement pathologist for Dr. Manion was signed to a contract long before the end of Dr. Manion's appeals. The hearing committee recommended that Dr. Manion be reinstated, subject to minor monitoring restrictions, as Chairman of the Department of Pathology. The same monitoring restrictions were imposed upon Dr. Manion's accusers, Drs. Pai and Evans, after evidence of their substantial error rate was presented by Dr. Manion to the review committee. Falsely claiming adherence to the committee's recommendations, the hospital reinstated Dr.

Manion's privileges but he was instructed not to set foot inside the hospital. He was then informed that his contract with the hospital had expired months *before* the initiation of the peer review hearings. This exclusion from the hospital facility made his hospital privileges meaningless, and were imposed even after Dr. Manion fully accepted the minor review restrictions placed upon him and his colleagues by the Ad Hoc Review Committee. Finally, Dr. Manion presented to the District Court over thirty staff physicians at Lima who had either testified or wrote strong letters in Dr. Manion's support attesting to his competence and dedication. (Opposition Motion at Exhibit A). All of this evidence suggested to the District Court that the entire proceeding had been a sham.

Faced with substantive and extensive disputes of fact, the District Court, employing an objective analysis, denied the Petitioners' Motion for Summary Judgment and held that

> [a] factual issue does exist as to whether Lima and Turner initiated the peer review proceeding with a reasonable view to further quality health care as required under 42 U.S.C. 11112(a). Also, whether or not this case does in fact grow out of testimony or recommendations taken during a peer review proceeding or whether it stems from a variety of separate events and conduct which resulted in the institution of peer review proceeding presents a factual issue.

(Petitioners' Appendix C at 18a).

The District Court also found, under an objective analysis, that Dr. Manion had presented sufficient evidence to question the truthfulness and motives of Dr.

Evans and denied Dr. Evans' motion for summary judgment under the HCQIA. (Petitio*ners' appendix D at 54a).* Petitioners' repeated claims that the District Court did not apply an objective standard is, in fact, contradicted by the District Court opinion: "the inquiry the Court must undertake under the HCQIA is *essentially objective. . . .* " (Petitioners' Appendix D 32a) (emphasis added)

In their appeal to the Sixth Circuit Court of Appeals, petitioners claimed that the district court applied an improper legal standard, that immunity under the HCQIA also applied to state law claims, and that the denial of a motion to dismiss and/or summary judgment based on the qualified immunity provided in the HCQIA is immediately appealable under the collateral order doctrine. Argument was heard on December 2, 1992. The Court of Appeals rendered an opinion on February 26, 1993 dismissing the appeal and holding that the HCQIA does not confer a right not to stand trial, and that the district court's order denying summary judgment is not immediately appealable.

ARGUMENT

I. THE SIXTH CIRCUIT'S HOLDING THAT THE HCQIA PROVIDES HOSPITALS AND PHYSICIAN PEER REVIEWERS IMMUNITY FROM DAMAGES AND NOT FROM SUIT COMPORTS WITH EXISTING CASE INTERPRETATIONS OF THE ACT.

The Sixth Circuit's decision conforms with other case interpretations of the HCQIA. For example, in *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433 (10th Cir. 1993), the Tenth

Circuit Court of Appeals dismissed the defendant hospital's appeal of a denied motion to dismiss as premature. The *Decker* court stated that "[t]he HCQIA establishes an immunity from liability only – the plain meaning . . . is that professional review bodies and covered individuals who satisfy the requirements of § 11112(a) are immune from liability only. On its face, this provision does not explicitly establish immunity from suit." *Id.* at 436. Clearly, *Decker's* holding and rationale is completely consistent with the decision of the Sixth Circuit Court in this case.

In an argument to justify certiorari, Petitioners attempt to fabricate a conflict between the Sixth Circuit's holding and the Supreme Court case of *Summit Health Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991). On page eight of their brief, petitioners claim this Court suggested, in a brief footnote to *Pinhas*, that the HCQIA provides immunity from suit, not damages. Aside from simply quoting this footnote, petitioners fail to support their conclusory interpretation of *Pinhas* with solid argument. Surely petitioners must realize that the *Pinhas* footnote was merely dictum in a case concerning the entirely separate issue of whether a physicians's allegations of an anti-competitive conspiracy constituted a nexus with interstate commerce sufficient for federal jurisdiction. *Id.* at 1848-49 & n.12.

Issues concerning the HCQIA, and in particular interpretation of whether the Act provides immunity from suit or damages, were at best collateral to the main questions in *Pinhas*. The Court was simply not called on to issue an informed interpretation of the HCQIA. However, in the interest of fairness and completeness, the remainder of the footnote stated: "[t]he immunity provisions [were] restricted so as not to protect illegitimate actions taken

under the guise of furthering quality health care. Actions . . . that are really taken for anti-competitive purposes will not be protected under this bill. *See* 132 Cong. Rec. H9957 (Oct. 14, 1986) (Remarks of Rep. Waxman)." *Id.* at 1848 n.12. Thus, if this footnote carries any weight whatsoever in interpreting the HCQIA, it must be that bad faith and anti-competitive purpose are necessary considerations of analysis under the standards of 11112(a).

Contrary to petitioners' assertions, the opinions in this case and *Decker, supra,* do not conflict with *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992). In truth, this case and *Austin* are not comparable. Here, the Sixth Circuit dismissed petitioners' appeal as premature, because it concluded the Act only conferred protection from damages and not immunity from suit. In doing so, the *Manion* appellate court did not evaluate the application or consideration of evidence to rebut the presumptions of § 11112(a) as had been addressed in *Austin.*

To the contrary, in *Austin,* the district court *granted* summary judgement for the defendant and the plaintiff-neurosurgeon appealed. The *Austin* appellate court was specifically called on to interpret application of the legal standard for rebutting the presumptions of the Act. The court concluded that summary judgement must stand because the plaintiff Dr. Austin had produced insufficient evidence to rebut the presumptions. *Austin* involved an appeal from a district court *granting* summary judgement, which is clearly a *final* order since it disposes of the case. Conversely, *Manion* involved the dismissal of an appeal of a district court *denying* summary judgement, which is clearly an *interlocutory* order not ripe for appeal. Not only

are the facts of each case significantly different, but the legal issues themselves differ and thus there can be no conflict between the cases.

Petitioners cite *Fobbs v. Holy Cross Health System Corp.*, 789 F. Supp. 1054 (E.D. Cal. 1992) for the proposition that a court may rule on whether a physician has rebutted the presumptions favoring a peer review proceeding under the HCQIA at an early stage of the litigation. *Fobbs* cannot be compared with the Sixth Circuit Court of Appeals decision in this case since the Sixth Circuit dealt with an interlocutory appeal of the denial of a motion for summary judgement. The two courts cannot be compared because the *district court* in *Fobbs* granted a motion for summary judgement on its facts. The determination of whether a physician can rebut the presumption under the HCQIA must be determined on the facts of the case at issue. Similarly, a court could decide that the physician had rebutted the presumptions that the standards of the HCQIA were not met or that a dispute of fact existed as to whether they were met. *See, e.g., Islami v. Covenant Medical Center, Inc.*, 1992 WL 480983 (N.D. Iowa) at 18. Here no conflict exists between *Manion* and *Fobbs* because the facts and issues of law are substantially different.

Finally, petitioners' claims that the HCQIA standards can cloak unjustified, bad faith, anticompetitive peer review, under an objective standard, is not supported by the article Petitioners cite at p. 20 as "[a]n excellent analysis of the Act's legislative history and objectives." (Petition for Writ of Certiorari at 20, n.4) The article concludes that "[u]nless a physician can overcome this presumption and demonstrate that a peer review action

stemmed from *anticompetitive or other improper motives*, he or she will be barred from collecting damages. *See* Adler, Robert S., *Stalking the Rogue Physician: An Analysis of the Health Care Quality Improvement Act*, 28 Am. Bus. L. J. 722 (1991) (emphasis added).

II. THE SIXTH CIRCUIT'S HOLDING THAT THE HCQIA GRANTS HOSPITALS AND PHYSICIAN PEER REVIEWERS IMMUNITY FROM DAMAGES AND NOT FROM SUIT COMPORTS WITH CONGRESSIONAL INTENT

The Sixth Circuit's holding completely agrees with *final* congressional intent as demonstrated by the legislative history and actual text of the Act. Most importantly, the language of the Act itself explicitly states that peer review participants "shall not be *liable in damages*" 42 U.S.C. § 11111(a)(1) (emphasis added). In no way does the Act label its protection "immunity from suit" *Id.* As the Sixth Circuit carefully noted, an earlier version of the Act did, in fact, appear to extend protection to immunity from suit, but that version was revised and restricted to reflect the current protections. *See* H.R. 5110, 99th Cong. 2d. Sess. 1986, *reprinted in The Health Care Quality Improvement Act of 1986: A Legislative History* at 196 (Bernard D. Reams ed. 1990). In explaining the revision, the legislative committee stated that such broad "protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality control. . . . " *See* H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, (1986), *reprinted in* 1986 U.S. Code. Cong. & Admin. News 6384, 6384-91. By citing views which were debated but later discarded, petitioners simply misrepresent congressional

intent by claiming the deleted portions of the Act embody genuine congressional purpose.

Even the Act's initial congressional findings, which embody the impetus for enactment of the HCQIA, explicitly state that "the threat of private money damage liability . . . unreasonably discourages physicians from participating in effective peer review" 42 U.S.C. § 11101(4). Obviously, there is no mention of the threat of litigation which would support construing the act as providing immunity from suit.

Further evidence that congress intended protection from damages and not immunity from suit is shown by the statements of Congressman Waxman, floor manager for the HCQIA. Mr. Waxman explained that the standard for measuring rebuttal of a § 11112(a) presumption was changed from "clear and convincing" to "preponderance of the evidence" because the clear and convincing standard might be "too complex in the minds of the juries." 132 Cong. Rec. at H11590 (Daily ed. Oct. 17, 1986). This language demonstrates that Congress intended juries to be the proper fact finders in determining issues of protection under the HCQIA, something that would be impossible if the protection was only immunity from suit, to be decided solely by the court.

Petitioners' citations supporting their view of the congressional intent are incomplete and misleading. As pointed out, they cite two committee comments made during debate which were later disregarded and deleted. Had they produced the entire quotation from the report they cite on page 11 of their brief, this Court would have been aware of the following crucial legislative history:

> Thus, there is a clear need to do something to provide protection for doctors engaging in peer review if this reporting system is to be workable. To that end, the bill provides limited, but essential, immunity. Doctors and hospitals who have acted in accordance with the reasonable belief, due process, and other requirements of the bill are protected from *damages* sought by a disciplined doctor. The bill protects innocent and often helpless consumers from abuses by bad doctors without insulating *improper anticompetitive behavior* from redress.

H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6385 (emphasis added).

This language leaves no doubt that the House of Representatives intended that the bill protect doctors from *damages* and not from suit. The Sixth and Tenth Circuit Courts of Appeals fully support this congressional intent in *Manion* and *Decker*. *Accord, Islami v. Covenant Medical Center, Inc.*, 1992 WL 480983 (N.D. Iowa) at 17 (immunity provided in HCQIA is limited immunity from liability *in actions for damages only*). (emphasis added)

As correctly analyzed by the Sixth Circuit, a statutory grant of immunity or protection from suit must be explicit. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800-01. The Sixth Circuit in *Manion*, and the *Decker* court as well, understood that far from being an explicit grant of immunity from suit, the plain text and congressional intent is that the HCQIA provide only protection from damages. As such, the Sixth Circuit properly dismissed the petitioners' appeal for lack of a final

appealable order in accord with the Tenth Circuit in *Decker*.

III. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT BASED ON THE LIMITED IMMUNITY OF THE HCQIA IS NOT IMMEDIATELY APPEALABLE.

The federal courts of appeals are vested with the power to review final decisions of the district courts. *See* 28 U.S.C. § 1291. A decision is final only when it ultimately disposes of an action and ends litigation on the merits. *See Catlin v. United States*, 324 U.S. 229, 233 (1945). Generally, denial of summary judgment is not final and appealable because the merits require further resolution at trial. In limited circumstances, appellate review of an interlocutory order is permitted under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 357 U.S. 541 (1949). Under *Cohen*, the order appealed must conclusively determine rights separate from the merits of the underlying claims and must be so important that immediate appellate review is necessary. *Id.* at 546. Denial of public official qualified immunity is one example of the "small class" of cases which are immediately appealable under the *Cohen* doctrine, because the right to avoid suit is lost if the case proceeds to trial. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1981).

Petitioners have submitted throughout these proceedings that the HCQIA confers public official immunity on hospitals and physician peer reviewers. This argument

has repeatedly failed and for good reason. The protections of the HCQIA and public official immunity are fundamentally different. Public official immunity is a creature of the common law, imbued with flexibility to protect officials performing discretionary duties against the uncertainty presented by many unsettled laws.

In contrast, the limited statutory protection of the HCQIA is narrowly tailored to physician peer review. The Act contains an internal conditional framework carefully structured to prevent abuse by peer reviewers who would use it to shield anti-competitive acts. Had congress intended application of the public official immunity in the HCQIA, it could easily have done so. For instance, Congress could have given antitrust protection analogous to the protection it gave local governments in the Local Government Antitrust Act of 1984. *See* Scott, Charity, *Medical Peer Review, Antitrust, and the Effect of Statutory Reform*, 50 Maryland L. Rev. 316, 405 (1991). Despite petitioners' claims, the fact remains that Congress took pains to create an entirely new framework with no reference to public official immunity.

This Court's holding in *Wyatt v. Cole*, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) directly addresses dismissal of interlocutory appeals for private defendants as opposed to public officials. The *Wyatt* court noted that rationales for according government officials qualified immunity from suit are not applicable to private parties, and stated:

> Accordingly, extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover,

> unlike government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Wyatt v. Cole, 112 S.Ct. at 1833-34.

Petitioners also suggest that the hospitals and peer reviewers can invoke the collateral order doctrine of *Cohen* and the shield of public official immunity because the law should consider them a state entity or "arm of the state." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf and Eddy, Inc.*, 113 S.Ct. 684, 684, 121 L.Ed.2d 605, 605 (1993). This identical argument, in the context of HCQIA, was expressly rejected in *Patrick v. Burget*, 486 U.S. 94 (1988), which held that peer reviewers are not state actors because their actions are not "actively supervised by the state itself." *Id.* at 101. To constitute state action, the state must have full authority to actually overturn the decisions of reviewing committees, and even judicial review falls short of the necessary "active supervision." *Id.* at 101-02. Under this analysis, petitioners are merely private defendants, rather than state actors or public officials. Petitioners note at page 16 that *Puerto Rico Aqueduct* was decided by this Court after oral argument in *Manion* implying that the *Manion* decision would have been different if *Puerto Rico Aqueduct* could have been argued. In fact, Petitioners do not inform this Court that they supplemented the case to the Sixth Circuit one month *prior* to the written decision in *Manion*.

Petitioners' misunderstanding of public official immunity is also seen in their concern that Dr. Manion did not "allege in the complaint that the adequate notice and hearing standards of Section 11112 (b) of the federal Health Care Quality Improvement Act of 1986, ("the Act" or "HCQIA"), 42 U.S.C. § 11112 (b) were not met." (Petition for Writ of Certiorari at 5). In actions involving the defense of public official immunity, plaintiffs oftentimes allege violations of constitutional rights. In *Mitchell v. Forsyth*, 472 U.S. 511 (1982), plaintiff Forsyth alleged that government official defendants had violated his rights under the fourth amendment and the Omnibus Crime Control and Safe Streets Act. *Id.* at 513. In *Hunter v. Bryant*, 112 S.Ct. 534, 116 L. Ed.2d 589 (1991), cited by petitioners, plaintiff Bryant alleged violations of his rights under the fourth, fifth, sixth and fourteenth amendments.

While petitioners think it significant that Dr. Manion did not allege violations of the HCQIA in his complaint, it is really meaningless. Petitioners' concern illustrates their mistaken belief that if petitioners were similar to government officials, then legal actions against petitioners would allege some HCQIA deprivation of "constitutional and statutory rights." In fact, the HCQIA "creates no cause of action for benefit of physicians to enforce its provisions." *Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187, 190 (S.D. Ohio 1991). The HCQIA "was not intended to . . . provide a disciplined physician with a private cause of action." *Caine v. Hardy*, 715 F. Supp. 166, 170 (S.D. Miss. 1989). Thus, there would be no reason for Dr. Manion to allege violations of the HCQIA in his complaint since there is no cause of action for such a

claim. In practice, the HCQIA is an elective defense which could not even be raised until after a complaint is filed. Allegations of failure to comply with the HCQIA in a complaint, thought to be so significant by petitioners, would result in dismissal of such complaint for failure to state a claim.

Petitioners, in citing *Hunter*, are asking this Court to hold them in the same esteem as those government officials who protect the life of the president by conferring on them *Harlow* qualified immunity. However, it is simply not congressional intent to extend such immunity to potential peer reviewers like those in *Patrick*. *See Patrick v. Burget*, 486 U.S. 94, 98 n.3 (1988) (conduct of peer review committee described as "shabby, unprincipled and unprofessional" by lower Court of Appeals, 800 F.2d 1498, 1509 (9th Cir. 1986)).

Public policy does not support petitioners' assertion that they be given special governmental public official immunity for peer review activities. "Both doctors and their patients can suffer if otherwise qualified doctors are wrongly denied staff privileges. . . . Thus, while sharing the interest of hospitals that only qualified doctors be given staff privileges, the public also has an interest in assuring that staff decisions are not made arbitrarily." *See Balkisson v. Capitol Hill Hosp.*, 558 A.2d 304, 308 (D.C. App. 1989). *See also, Rosenblit v. Superior Court*, 282 Cal. Rptr. 819, 827 (Cal. App. 4 Dist. 1991) (unfair treatment and denial of due process in physician peer review described as charade which did not serve public interest).

Petitioners' concern for judicial economy and increasing numbers of antitrust trials as a result of the *Manion*

decision is contradicted by the Sixth Circuit which noted "the strong policy against piecemeal appeals" as a basis for its decision. *Manion v. Evans*, 986 F.2d 1036, 1042 (6th Cir. 1993). In fact, under petitioner's argument, the possibility of an interlocutory appeal first on denial of a motion to dismiss followed then by a second interlocutory appeal on denial of a motion for summary judgment will result in a deluge of appeals.

Finally, petitioner's concern that antitrust cases will inhibit peer review is not supported by legal scholars. "Staff privilege antitrust cases rarely reach trial, much less a judgment for plaintiff. They have not been a successful refuge for disciplined physicians." *See* Miles, John J., *Health Care and Antitrust Law: Principles and Practice*, 7-62 (1993). Petitioners' concern of a "chilling effect" on peer review is remarkably similiar to a chilling effect argument unanimously rejected by this Court addressing peer review confidentiality in academia. *See University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182 (1990).

Clearly, petitioners are not a state entity or arm of the state under any test. Instead, they are simply private entities and private individuals directing their own operative decisions and acting towards their own private purposes. On occasion, these private entities and individuals may engage in anti-competitive activities such as bad faith peer review. Petitioners are private defendants, not public officials, and while they are fortunate to enjoy limited protections under the HCQIA, they cannot stretch this protection beyond congressional intent and receive public official immunity. As the *Patrick* court wisely noted, "If physicians believe that the Act [HCQIA] provides insufficient immunity to protect the peer review

process fully, they must take that matter up with Congress." *Patrick*, 486 U.S. at 105-06, n.8.

CONCLUSION

The petition for writ of certiorari should be denied because both the Sixth Circuit in the present action and the Tenth Circuit in *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433 (10th Cir. 1992) have held without dissent that the district courts' decisions denying defendants' motions for dismissal or summary judgment are not appealable final orders.

The petition should be denied because the dictum from *Summit Health v. Pinhas*, 111 S.Ct. 1842 (1991) is not in conflict with *Manion*. The Sixth Circuit's holding comports with congressional intent to specifically reject earlier versions of the HCQIA's "very broad protection from suit" for a more restricted protection from "liability for damages" because of antitrust concerns. *See Manion* at 1041. Moreover, the Sixth Circuit's decision, which dealt with completely different facts and legal issues, cannot be said to be in conflict with *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

The petition should be denied as the court's denial of a motion for summary judgment based on HCQIA immunity is not immediately appealable under the collateral order doctrine. Petitioners are not government officials who fall within the very limited class of interlocutory appeals permitted by the *Mitchell* and *Cohen* decisions.

Finally, the petition should be denied as judicial economy weighs against the creation of innumerable piecemeal appeals. Public policy mandates denial to afford some protection to competent physicians whose patients also suffer the effects of anti-competitive, bad faith peer review. Such anti-competitive activities, repeated every day, exacerbate health care costs and harm competition and society even more than such activities harm the individual physician. In this new age of health care reform, monopolistic hospitals and their disgruntled administrators, using malicious peer review to protect and further their own private financial interests, have neither earned nor deserve special public official qualified immunity.

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